88-2054

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES CLAY SMITH, SR.,
Petitioner,

v.

LOUIS W. SULLIVAN,
DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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Date of Admission: June 5, 1989

QUESTION PRESENTED FOR REVIEW

Whether the evidence of record demonstrates that the Petitioner's Motion for New Trial and to amend Judgment and findings of the District is properly before the Court.

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OPINIONS BELOW

The January 25, 1989, opinion of the Court of Appeals whose Judgment is herein sought to review is reprinted in the Appendix to this petition, pp. 1a. The prior opinion of the United States District Court for the Eastern District of Texas, Tyler Division, also reprinted in the Appendix, are reported as follows: The District Court's Order Overruling the Petition for a New Trial. pp. 1a.

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on January 25, 1989. Appendix pp. 1a. A timely petition for rehearing was denied on February 23, 1989. Appendix pp. 1a. The

Jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Rule 59(a) of the Federal Rules of Civil Procedure which provides as follows:

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trial have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearing have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial

in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony amend findings and conclusions, and direct the entry of a new judgment.

STATEMENT OF CASE

Plaintiff filed his original complaint on September 23, 1983 in the Eastern District of Texas, Tyler Division, alleging a violation of Section 717 of the 1972 Amendments expanding coverage of the Civil Rights Act of 1972, 42 U.S.C. 2000e-16; 29 U.S.C., Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Section 791 and a violation of the Consent Order dated February 8, 1981.

Plaintiff alleged that at all times

material to this action that the Defendant, Secretary, Health and Human Services (hereinafter referred to as HHS) has engaged in unlawful employment practices in its Region Six (6) facility at Pasadena, Texas, in violation of Section 704(a) of Title VII.; 42 U.S.C. 2000e-3, such unlawful employment practices include, but are not limited to the following (a) retaliating against Plaintiff for filing a charge of discrimination, (b) assigning Plaintiff janitorial duties, (c) subjecting Plaintiff to excessive supervision, undue criticism, harassment, making certain entries in his personnel file which reflected adversely upon him,

(d) refusing to reassign him although Defendant had knowledge of his established medical limitations: and (e) constructively discharging Plaintiff by continually restricting and assigning him to duties in the mail room and by continually refusing to permit him to transfer to another position for which he was qualified.

On June 25, 1981, prior to the instant action, Plaintiff filed Civil Action No. H-81-1650 in the Southern District of Texas, against Secretary, Health and Human Services alleging that (HHS) violated Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e-16, by demoting him without a ninety (90) day warning based on race, Black.

Subsequently, (HHS) moved to dismiss the demotion claim on the ground that the Withers consent decree constitutes a final judgment in all claims of race discrimination in employment that could have been brought against HHS between 1972 and 1981, except for limited exceptions inapplicable in this action. Since the doctrine of res judicata prevents Plaintiff from relitigating his claim of demotion. In this action, Plaintiff defended Defendant's motion on the ground that the Withers consent decree covers only HHS employees who denied promotions or applicants who were denied employment, whereas, he asserts a claim based on demotion. He further argued that, even if he were a member of the Withers class at one time, he

was allowed to opt out of the class to prevent extinction of his claim.

Civil Action No. H-81-1650 (S.D. Tex., June 25, 1981) was transferred in 1985, to the Eastern District of Texas for that Court to determine whether its con sent decree entered in Withers v. Schweiker, Civil Action No. S. 77-3-CA Feb. 11, 1981), precluded Plaintiff from raising his claim of race discrimination.

Plaintiff's second complaint was filed originally in the Eastern District of Texas, Sherman Division in 1988, Charles Smith, Sr., v. Margaret M. Heckler, Secretary of Health and Human Services, Civil Action No. S-83-168-CA,E.D. Tex. September 25, 1983. It was transferred to the Tyler Division in 1985, for

consolidation with Plaintiff's earlier action. (Trial Court's Order, Page].)

After the two cases had been consolidated, the Court concluded that Plaintiff "having timely presented his claims of reprisal to (HHS) and having received notice of his right to sue; that Plaintiff has exhausted his administrative remedies and may litigate his claim in this forum." (Trial Court's order, page 23.)

On June 11, 1986, the District Court issued a memorandum opinion and order dismissing HHS's motion for summary judgment on Plaintiff's Title VII claim of a discriminatory demotion; severed Civil Action No. TY_85-84-CA, and re-transferred it to the District Court

where the claim arose (S.D. Tex.), reinstating jurisdiction of the reprisal issue in Civil Action No. TY-85-84-CA (Trial Court Order, Page 24.)

On November 4th and 5th, 1987, following trial on the merits, the District Court issued its final judgment for the Defendant.

ARGUMENT

Certiorari should be granted because the decisions of the Court of Appeals and the District Court denying Plaintiff's motion for a new trial is not in accordance with law. This issue in this case is whether the Petitioner raised the issue of a violation of the Civil Service Reform Act of 1978, 5 U.S.C. Section 4302 et seq., for the

first time after trial and judgment of the District Court. In finding that the Plaintiff-appellant raised the violation issue after tiral and judgment, the Court below misapplied the rule declared in Hormel v. Helvering, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed 1037, 1041 (1941), this Court said that while recognizing the desirability and existence of a general practice under which Appellate Court confined themselves to the issue raised below. Nevertheless, do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice. We submit in reviewing a similar case, Ward v. Anderson, 93 U.S. App. D.C. 156, 208 F.2d 48, 50 (1953): We observe, as

did the Appellate Court, that although civil service employee who was discharged for unsatisfactory services pursuant to statute authorizing removal from civil service for such cause as will promote effeciency of civil service, raised issue as to applicability of section of statute authorizing removal for unsatisfactory performance if 90 day prior warning had first been given for first time in District Court, issue could be considered notwithstanding that issue would not be resolved without benefit of prior ruling by administrative agency involved. 5 U.S.C.A. 652(a); Performance Rating Act of 1950, Sec. 6, 5 U.S.C.A. 2005.

In this appeal, however, the Appeal Court insists that such failure is fatal to judicial review, upon the familiar principle stated by the Supreme Court in Hormel v. Helvering, supra, but in that case, the Supreme Court also warned that there may always be exceptional cases or particular circumstances which will prompt a reviewing or Appellate Court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the Court or Administrative Agency below.

Finally, we submit, and in clear contradiction to established law, the Court of Appeals to ignore the exception to the general rule regarding issues for the first time on appeal.

The Petitioner here, is not seeking review of this case rule, however, the Petitioner does contend that he did specifically, raised the issue that certain adverse actions were taken against him in violation of the 1978 Civil Service Reform Act, 5 U.S.C. Sec. 4302 et seq, and that this argument was raised on the record before the District Court and the Court of Appeals. Thus we submit that in our view that circumstances of this case does not fit the exception nor the general rule in that Petitioner had previously raised the issue of the applicability of the Civil Service Reform Act of 1978, to his adverse action.

We have argued abouve that both the Court of Appeals and the District

Court applied erroneous legal principles in ascertaining that Petitioner raised the issue regarding the 1978 Civil Service Reform Act for the first time after trial and judgment in this case. We think the Court of Appeals misconstrued the basis on which Petitioner sought review of the denial of his Motion for a New Trial. Moreover, its own opinion drains the consent of raising the issue for the first time on appeal (recognized by Supreme Court in Hormel v. Helvering, supra.)

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TYLER DIVISION

CHARLES C. SMITH, JR. Plaintiff	X X	
V.	X	CIVIL ACTION NO.
OTIS R. BOWEN, Secretary, Department of Health and Human Services	X X X X	TY-86-50-CA

JUDGMENT

This action came on for trial before the undersigned on November 4 and 5, 1987. In conformity with the findings of fact and conclusions of law filed in the above-entitled and numbered civil action, it is

ORDERED, ADJUDGED, and DECREED that the plaintiff take nothing, that the

above-entitled and numbered civil action shall be, and it is hereby, DISMISSED, and that each party shall bear his own costs of this action.

SIGNED this 26th day of May, 1988.

WM. WAYNE JUSTICE,
CHIEF JUDGE

App. 3

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TYLER DIVISION

CHARLES C. SMITH, JR., Plaintiff	X	
V.	X	CIVIL ACTION NO.
OTIS R. BOWEN, Secretary, Department of Health and Human Services, Defendant	X	TY-86-50-CA

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

On November 4 and 5, 1987, the above-entitled and numbered civil action came on for trial. Having heard the evidence presented, and having duly considered all testimony, exhibits, and arguments of counsel, the court now enters these findings of fact and conclusions of law in conformity with Fed.

R.Civ.P. 42(a).

I. Findings of Fact.

1. The plaintiff, Charles Clay Smith, is a black male citizen of the United States, and a resident of Houston, Texas.

2. The defendant, Otis R. Bowen, is the Secretary of the United States Department of Health and Human Services (HHS), an executive agency of the federal government.

3. The plaintiff commenced this civil action to challenge alleged employment discrimination against him in violation of the 1964 Civil Rights Act, 42 U.S.C. §2000e-3 and 2000e-16 of the

1973 Rehabilitation Act, as amended, 29 U.S.C. §791 et seq., and of a Consent Decree entered in Withers v. Harris, Civil Action No. S-77-3-CA (E.D. Tex. Feb. 11, 1981).

4. The plaintiff claims that he was a victim (1) of adverse treatment by the defendant in retaliation for his efforts to vindicate his civil rights; (2) of discrimination in the conditions of his employment on the basis of a physical handicap; (3) of a retaliatory refusal to reassign: and (4) of constructive discharge under circumstances of racial discrimination, discrimination on the basis of physical handicap, and reprisal for having filed earlier complaints and for having testified in

proceedings relating to the Withers controversy.

5. The plaintiff was employed by the Social Security Administration (SSA), a component of HHS, from Feb. 1973 , to April, 1981. After completing a training program, the plaintiff was initially assigned to a SSA office in Houston, Texas. In June, 1979, the plaintiff was transferred from the Houston office to the SSA Pasadena, Texas, office, and demoted from a GS-10 position as a SSA Claims Representative to a GS-3 position as a Mail and Supply Clerk. The plaintiff's demotion and reassignment to the Pasadena office is the subject of a separate civil action in the U.S. District Court for the

Southern District of Texas, and the propriety of that demotion and reassignment, and of other events attending his tenure in the SSA Houston office, is not at issue in the action now before this court.

6. The plaintiff was employed at the SSA Pasadena office from June 17, 1979, to May 29, 1981. At all times pertinent to this action, the plaintiff was employed as a GS-3 Mail and Supply Clerk in the SSA Pasadena office.

7. On June 14, 1979, the plaintiff filed his first complaint with the Civil Service Commission against Linda Williams, a SSA employee who had proposed the plaintiff's demotion and transfer, and Kenneth Martin, the SSA Area III

Director who decided to take the action that Williams had proposed. In that complaint, the plaintiff alleged continuing discriminatory actions against him on the basis of his race and sex, as well as reprisal against him in the form of his demotion, the placement of adverse performance evaluations into his personnel file, and adverse working conditions.

8. On June 11, 1980, almost one year after the plaintiff commenced work at the SSA Pasadena office, he received from his supervisor, Joe Bagley, a letter setting forth his assignment of duties and job discription.

9. On June 27, 1980, the Merit

System Protection Board sustained Martin's decision to demote and transfer the plaintiff to the SSA Pasadena office. On July 5, 1980, the plaintiff appealed this decision to the Office of Review and Appeals of the Equal Employment Opportunity Commission (EEOC).

10. On August 18, 1980, the plaintiff submitted a request for a "conditional reassignment" to a Claims Representative position in the SSA's downtown Houston or northeast Houston office. The request was submitted to Martin. It was based on the plaintiff's asserted back pain problems, which the plaintiff claimed to have been aggravated by the "prolonged periods of standing, walking, dirving, stooping and some

lifting" required by his job at the SSA Pasadena office.

11. On September 29, 1980, Martin denied the plaintiff's request for "conditional reassignment." In his letter of denial, Martin stated that there were availabe no other SSA Area III positions for which the plaintiff was qualified, and Martin reiterated his earlier determination that the plaintiff was not qualified to perform the duties of a Claims Representative.

12. There is no evidence of any casual connection between Martin's denial of the plaintiff's request for reassignment and the plaintiff's filing of a discrimination claim in any forum, or engaging in any other protected

activity.

13. On January 16, 1981, the plaintiff was given an employee evaluation of an "overall 'B' rating," from Bagley. The rating denoted that, in Bagley's opinion, the plaintiff met, but he did not exceed, the general requirements of his position as a Mail and Supply Clerk at the SSA Pasadena office. In his employee evaluation, Bagley stated that "[i]n some areas [the plaintiff] does not meet expected requirements, i.e., initiative, resourcefulness, planning, organizing and settling priorities, and adherence to rules and regulations." This evaluation was placed in the plaintiff's SSA personnel file.

14. There is no evidence of improper adverse evaluations having been

entered in the plaintiff's personnel file while the plaintiff was employed in the SSA Pasadena office.

15. On January 26, 1981, the plaintiff appeared as a witness at a hearing in the controversy styled Withers v. Harris, supra. Before this date, the plaintiff requested of Bagley, and received, leave to attend the hearing.

16. On March 16, 1981, Bagley requested that the plaintiff remove and collect filters from eight "ecologizers," small desk top machines designed to clean office air.

17. However, there is no evidence that the plaintiff was assigned improper janitorial duties.

18. There is no evidence that the plaintiff presented to his SSA supervisors

a restructuring of his position as Mail and Supply Clerk so as to accomodate any alleged physical limitations.

20. At the trial of this matter, no evidence was presented to indicate improper treatment of the plaintiff motivated by reason of the plaintiff's race.

21. On March 20, 1981, the plaintiff filed a complaint with the EEOC against Bagley and Martin, claiming their adverse and disparate treatment of him, their harassment of him, their violations of his privacy, and their restraint of his career advancement. In that complaint, the plaintiff alleged that Bagley's and Martin's assertedly wrongful conduct was motivated by the plaintiff's race and handicap, and done in retaliation for

his earlier pending complaint against Martin. The plaintiff requested, as relief, that his personnel file be purged of allegedly deceitful entries, that he be reassigned to a SSA office in Houston, and that he be protected against reprisal.

22. On March 30, 1981, Bagley wrote an adverse action letter proposing to terminate the plaintiff's employement with the federal government because of unacceptable performance. Bagley stated in that letter that the plaintiff's performance was unacceptable because

> [y]ou [that is, the plaintiff] cannot be depended upon to come to work; you require an excessive amount of supervision when you are at work; you often ignore your

basic duties even to the extent of insubordination; you constantly interfere with the work of other employees; you ignore office rules and regulations; and your attitude towards your work has created a bad morale problem in the office for the employees who have to do your work and for those who question why you are not required to work.

23. On April 15, 1981, the plaintiff contacted HHS Equal Employment Opportunity (EEO) counselor, Gerald Yoes, and the plaintiff alleged that he had been subjected both to discrimination (based on race and physical handicap), and to reprisal (for filing an earlier appeal of adverse action and for earlier

complaints of racial and handicap discrimination).

24. Yoes' report stated that the plaintiff's allegations of reprisal to the EEOC arose from Martin's refusal to reassign the plaintiff to another GS-10 position as a Claims Representative, and from Bagley's March 30, 1981, proposal to terminate the plaintiff.

25. Yoes reported that he had failed to resolve the plaintiff's EEOC complaint through conciliation, and that the plaintiff could file a formal complaint with HHS.

26. On May 29, 1981, the plaintiff voluntarily elected to retire from federal service.

27. On July 16, 1981, the plaintiff filed a formal administrative complaint

with HHS. In this complaint, the plaintiff alleged Martin's and Bagley's discrimination against him, movtivated by his race and physical handicap, and their reprisal against him for filing earlier complaints. This complaint was later dismissed for failure to prosecute. On August 22, 1983, on appeal to the EEOC, the dismissal was vacated, and the complaint was remanded to HHS for consideration on the merits. The plaintiff also was notified of his right to commence a civil action. He exercised that right on September 23, 1983.

II. Conclusions of Law.

1. Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-3(a), provides in pertinent part that "[i]t shall be an unlaw-

ful employment practice for an employer to discriminate against any of his employees ... because he has made a charge" of a Title VII violation.

2. According to the order and allocation of the burdens of proof in a Title VII retaliation action, such as the one now before the court, the plaintiff first must establish a prima facie case. This is accomplished by the plaintiff showing (a) that he engaged in an activity protected by Title VII; (b) that an adverse employment action occurred; and (c) that there was a causal connection between participation in a Title VII-protected activity and the adverse employment action. See Burdine v. Texas Department of Community Affairs, 450 U.S. 248 (1981); McDonnell Douglas Corporation v. Green, 411 U.S. 792,

802-04 (1973); McDaniel v. Temple Independent School District, 770 F.2d 1340,1346 (5th Cir. 1985); McMillan v. Rust College, 710 F.2d 1112, 1116 (5th Cir. 1983); DeAnda v. Saint Joseph Hospital, 671 F.2d 850,856 (5th Cir. 1982); Conley v. Jackson Police Department, 566 F.2d 994,998 (5th Cir. 1978).

3. For a plaintiff to prevail in a Title VII retaliation action, the standard of proof is different from that in a Title VII employment discrimination controversy. In a retaliation case, the test is whether retaliation for participation in a protected activity was a necessary, or "but for," cause of the adverse employment action. Failure to meet this test disentitles the plaintiff to judgment on the claim. McDaniel, supra, at 1346;

Jack v. Texaco Research Center, 743 F.2d 1129,1131 (5th Cir. 1984); see also McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273,292 n. 10 (1976); Jackson v. City of Killeen, 654 F.2d 1181, 1186 (5th Cir. 1981); Pittman v. Hattiesburg Municipal Separate School District, 644 F.2d 1071, 1076 (5th Cir. 1981).

4. If the plaintiff does establish a prima facie case of unlawful retaliation, the burden of proof shifts to the defendant, who must produce a nondiscriminatory reason or reasons for the adverse employment action. McDaniel, supra, at 1346; McMillan, supra, at 1116; DeAnda, supra, at 856.

5. Once the defendant meets its burden of production, the evidentiary focus again shifts to the plaintiff, who must then sustain his burden of persuasion

by showing that the defendant's non-discriminatory reason or reasons are pretextual. Burdine, supra, at 253; McDaniel, supra, at 1346; McMillan, supra, at 1116.

6. All of the plaintiff's administrative complaints, litigation on his own behalf, and participation in the controversy styled Withers v. Harris, infra, are protected activities within the meaning of Title VII.

7. There is no evidence of an causal connection between any of the plaintiff's conditions of employment at the SSA Pasadena office, the placement of adverse evaluation entries into the plaintiff's SSA personnel file, or the procedural handling of plaintiff's administration complaints. With respect to these allegations, the plaintiff has

failed to establish a prima facie case of retaliation under 42 U.S.C. §2000e-3 (a).

8. With respect to one of the plaintiff's claims, that Joe Bagley's proposal to terminate the plaintiff was an act of retaliation for the plaintiff's protected activities, the plaintiff has established a prima facie case.

9. However, respecting Bagley's termination proposal, the defendant has successfully rebutted the prima facie showing ofretaliation. The evidence demonstrates that the reasons for Bagley's proposal were legitimate and non-retaliatory. The plaintiff has produced no evidence that the reasons given by the defendant for Bagley's acts were pretextual.

10. Accordingly, the evidence fails

to support a claim of retaliation in violation of Title VII.

11. Paragraph IV(5) of the Feb. 11, 1981, Consent Decree in Withers v. Harris, Civil Action No. S-77-3-CA (E. D.Tex.), provides that

> Region VI of HHS shall not engage in or be party to any act, policy or practice which has the purpose or effect of discriminating or retaliating in any manner against any plaintiff, any employee or former employee, or any applicant for employment because he or she has furnished information or participated in any respect in the prosecution of this action or because he or she has made any charges, testified, asserted a

claim, or participated in any manner in any investigation or proceeding under 42 U.S.C. §2000e -16 or any regulations promulgated thereunder.

12. The burdens and standard of proof for a claim of retaliation in violation of the Withers decree are identical to those governing Title VII retaliation claims under 42 U.S.C. §2000e -3(a).

13. Accordingly, for the reason set forth above in connection with the plaintiff's §2000e-3(a) retaliation claim, the evidence fails to support the plaintiff's Withers retaliation claim.

14. The 1973 Rehabilitation Act, as amended, 29 U.S.C. §794, provides in pertinent part that "[n]o otherwise

qualified individual with handicaps ... shall, solely by reason of his handicap, be subjected to discrimination ... under any program or activity conducted by any Executive agency ... ."

15. The 1973 Rehabilitation Act reaches discriminatory conduct by federal agency employers, and it prescribes the remedial procedures applicable to Title VII cases under 42 U.S.C. §2000e-5 and §2000e-16. See, e.g., Prewitt v. United Postal Service, 662 F.2d 292, 302 (5th Cir. 1981).

16. A plaintiff claiming to be the victim of discrimination in violation of the 1973 Rehabilitation Act will not prevail unless he meets his burden of proving (a) that he is handicapped, within the meaning of the Act; and (b) that he is "otherwise qualified" to perform

the duties of the employment position at issue. See, e.g., School Board of Nassau County v. Airline, 107 S.Ct. 1123, 1126-41 (1987); Jasany v. United States Postal Service, 755 F.2d 1244, 1250 (6th Cir. 1985).

17. According to the 1973 Rehabilitation Act, a handicapped person "(i) has a physical or mental impairment which substantially limits one or more of [his] major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. §706(8)(B).

18. Regulations issued under the 1973 Rehabilitation Act define "major life activities" as "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, breathing,

learning, and working." 29 C.F.R. §1613.702(c). An "impairment," pursuant to the applicable regulations issued, includes "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine." 45 C.F.R. §84.3(j)(2)(i)(A). See also Arline, supra, at 1127; Oesterling v. Walters, 760 F.2d 859, 861 (8th Cir. 1985).

19. Therefore, in order to establish a prima facie case by reason

of handicap, the plaintiff must establish that he has an impairment that substantially limits at least one major life activity. See Forrisi v. Bowen, 794 F.2d 931, 933-34 (4th Cir. 1986); Jasany, supra, at 1249.

20. The plaintiff has failed to meet his burden of proving that he is a handicapped person within the meaning of 29 U.S.C. §706. His evidence fails to demonstrate that his contended impairment substantially limits a major life activity. It is therefore unnecessary to address the issues of whether the plaintiff was "otherwise qualified," or whether he had been discriminated against.

21. Having failed to prove that

that the defendant and his agents treated the plaintiff unlawfully under Title VII and the 1973 Rehabilitation Act, the plaintiff is entitled to no relief.

To the extent that the foregoing findings of fact also constitute conclusions of law, and to the extent that the foregoing conclusions of law, and to the extent that the foregoing conclusions of law also contain findings of fact, they are alternatively so denominated. A judgment for the defendant shall be separately issued.

SIGNED this 6th day of May, 1988.

CHIEF JUDGE
(WM. WAYNE JUSTICE)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-2909

CHARLES C. SMITH, SR.	X	Plaintiff-Appellant,
versus	X	
OTIS R. BOWEN.M.D. Secretary of Health and Human Services	X	Defendant-Appellee.

Appeal from the United States.

District Court for the

Eastern District of Texas

ORDER:

IT IS ORDERED that appellee's motion to strike certain references and documents from appellant's reply brief is MOOT.

/s/ Jerry E. Smith
United States Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 88-2909
Summary Calendar

CHARLES C. SMITH, SR.,

Plaintiff/Appellant

VERSUS

OTIS R. BOWEN, M.D.,
Secretary of Health and Human Services,

Defendant/Appellee.

Appeal from the United States

District Court for the

Eastern District of Texas
(TY-86-50-CA)
(January 25, 1989)

Before POLITZ, KING, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Appellant Charles Clay Smith, Sr., appeals from a take-nothing judgment rendered after a bench trial on his claim that his superiors at the Social Security Administration (SSA) retaliated against him for engaging in protected activities in violation of 42 U.S.C. §2000e-3(a), and discriminated against him because he was handicapped, in violation of 29 U.S.C. §794. We affirm.

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* Local Rule 47.5.1 provides "The publication of opinions that have no precendential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In June, 1979, Smith, who is black, was demoted from his position as a claims representative in SSA's Houston, Texas, office to the position of a mail and supply clerk in SSA's Pasadena, Texas, office.1/ After asking unsuccessfully in August 1980 to be "conditionally reassigned" to his previous position in the Houston office on the ground that his back

1/ Shortly after his demotion, Smith filed a complaint with the Civil Service Commission alleging that his demotion was improper. In June 1980, the Commission sustained the decision to demote and transfer Smith. Thereafter, Smith filed a separate civil action contesting his demotion and reassignment, which action was still pending at the time the district court issued a decision in the instant action; thus, the propriety of Smith's demotion and transfer is not before us.

condition was being aggravated by his duties as a clerk, Smith sought counseling from a Health and Human Services (HHS) Equal Employment Opportunity (EEO) counsleor, Lana Simpson. Although they spoke several times by phone and scheduled at least one meeting, Smith and Simpson never met.

On January 16, 1981, Joe Bagley, Smith's direct supervisor at the Pasadena office, submitted a six-month evaluation of Smith's performance. On a scale of A to E, with "A" signifying unacceptable performance, Smith received a "B" -- indicating that his performance was the minimal acceptable -- but Bagley noted in his evaluation that Smith's performance was below the expected requirements in several areas, including

initiative, resourcefulness, and adherence to rules and regulations.

Ten days later, Smith appeared as a witness in a class action civil rights case against the SSA, Withers v. Harris, C.A. No. S-77-3-CA (E.D. Tex. Feb. 11, 1981). Smith was granted leave for the day by Bagley, although Bagley testified that he did not know the reason for Smith's leave request.

On March 20, 1981, Smith filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging a retaliatory denial of EEO counseling as well as handicap and racial discrimination and seeking (1) to have his file purged of all "deceitful"

materials, (2) reassignment to his former position in the Houston office and (3) protection from reprisal.

On March 30, 1981, Bagley, who testified that he was at the time unaware of both Smith's testimony in the Withers case and the charges filed by Smith with the EEOC submitted a proposal to terminate Smith's employment. In the proposal, a copy of which was given to Smith, Bagley cited specific instances where Smith had failed to comply with office rules, had failed to perform his assigned duties and had disrupted the office. The proposal, which had to be approved by a higher official, explained to Smith that no action would be taken

until he had a chance to reply, that he could contest the proposal and that he had the right to representation. Smith did not contest the proposal, and before a higher official approved it, chose to retire on May 29, 1981.2/

On July 16, 1981, Smith filed a formal claim of retaliation and discrimination with HHS, but an HHS EEO specialist dismissed the claim for failure to prosecute after Smith failed to provide further information

2/ Before retiring, Smith contacted a second EEO counselor, Gerald Yoes, and informed him of his cliams of discrimination and reprisal. Yoes met with Smith's supervisors and attempted to reach an informal resolution of Smith's complaints, but was unsuccessful.

requested by the specialist. On December 1, 1981, Smith appealed to the EEOC, which, on August 22, 1983, remanded the claim to HHS for further consideration and notified Smith of his right to commence a civil action wihtin thirty days.

Smith filed the instant action on September 23, 1983, alleging that the defendant retaliated against him for his participation in protected activities by, inter alia, refusing to reassign him despite knowledge of his medical limitations, denying him EEO counseling, and proposing that he be discharged, and that the defendant also discriminated against him because of his disability. After a bench trial, the court found for the

defendant on all of Smith's claims. Smith appeals on the gournd that the court's factual findings are not supported by the evidence.

II.

We will affirm a trial court's factual findings unless they are clearly erroneous. See Fed. R.Civ. P. 52(a). After reviewing the record, we find none of the court's findings on Smith's three retaliation claims to be in error.

Section 704(a) of Title VII of the Civil Rights Act of 1964 (the "Act"), 42 U.S.C. §2000e-3(a), prohibits an employer, including the federal government, see 42 U.S.C. §2000e-16, from discriminating

against any employee because he or she has filed, or otherwise been involved in, a charge of discrimination. To make out a prima facie case of retaliation, the employee must show (1) that he or she participated in an activity protected by the Act: (2) that an adverse employment action occurred; and (3) that there was a causal connection between the adverse action and the participation in the protected activity. See McDaniel v. Temple Ind. Sch.Dist., 770 F.2d 1340 (5th Cir. 1985).

Once that prima facie case is made, however, the burden of production shifts to the defendant, who must produce a nondiscriminatory reason or

reasons for the adverse employment action; if such a showing is made, it is then up to the plaintiff to show that the nondiscriminatory reason or reasons advanced are merely pretextual. See id. At the heart of this inquiry is the ultimate factual issue of causation, on which the plaintiff bears the burden of proving that the adverse employment action would not have occurred "but for" his or her participation in protected activities. See Jack v. Texaco Research Center, 743 F. 2d

1129, 1131 (5th Cir. 1984) 3/

There is little question that Smith met his burden of production on the first two elements; the dispute between the parties goes to whether he met his burden of proving causation.

We deal with each of the claimed instances of retaliation in order.

A. Denial of Smith's Request for Reassignment.

On September 29, 1980, one of Smith's supervisors, Kenneth Martin,

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3/ Smith also claimed that the defendant's retaliatory actions violated ther terms of the consent decree issued Feb. 11, 1981 in the Withers, case. As the district court in the instant case noted, however, the language of the decree was virtually identical to the language of §2000e-3(a); thus, the same standards and burdens of proof apply to claims under either Title VII or Withers.

denied his request that he be "conditionally reassigned" to his previous position as a claims representative in SSA's Houston office. Martin informed Smith that there were no other SSA positions, in the area, for which Smith was qualified, and reiterated his view that Smith was unqualified to perform the duties of a claims representative.

Although the court found that Smith had, prior to the denial of his request, filed a complaint with the Civil Service Commission against Martin and another SSA employee alleging (1) that his demotion was the result of discrimination on the basis of race and sex, (2) that adverse performance evaluations were placed in his personnel file, and (3) that he was the victim of

adverse working conditions, it also found that there was no evidence of any causal connection between the complaint or any other protected activity and Martin's denial of Smith's request. It thus found that Smith had failed to establish a prima facie case on this claimed instance of retaliation.

On appeal, Smith does little more than restate the facts summarized above and his belief that a causal connection exists; he does not refer us to any evidence in the record, even in the form of his own testimony, establishing that there was a causal connection between his civil service complaint and the denial of his request. Our independent reading of the record

suggests that none exists, and that Smith's request to be "conditionally reassigned" was in reality merely another challenge to his demotion and transfer. We thus conclude that the district court's conclusion on this issue is correct.

B. The Alleged Denial of EEO Counseling.

Federal regulations provide that federal agencies are to provide aggrieved employees with counseling to assist in attempts to resolve claims of discrimination informally. See 29 C.F.R. §1613.213 (1988). Smith alleged that EEO counselor Simpson's failure to meet with him and assist in the resolution of his complaints was in retalitation for his partici-

pation in protected activities. Although the district court did find that there was no causal connection between the "procedural handling of [Smith's] administrative complaints" and his engaging in protected activities, it did not address specifically the handling of Smith's request for EEO counseling.

We nonetheless conclude that there is no evidence indicating that Simpson's handling of Smith's claim was connected with Smith's protected activities. Ms. Simpson testified that she was unable to leave the office to meet with Mr. Smith because of both her heavy workload and logistical problems caused by her lack of a car. Moreover, in response to questions by Smith's counsel, she denied that anyone at SSA ever discouraged her

from assisting smith; indeed, there is no evidence that she was aware that he had ever engaged in protected activities. Finally, we note that Smith was provided with substantial assistance by another EEO counselor prior to his retirement. There is simply no evidence of retaliation in this instance.

C. The Proposal To Terminate Smith's Employment.

On this issue, the court did find that Smith had made out a prima facie case that Bagley's proposal to terminate Smith's employment was an act of retaliation for Smith's participation in protected activities, most likely because it followed so closely on the heels of Smith's filing of a complaint with the EEOC and his testimony in the

Withers case. The court nonetheless found that the defendant successfully rebutted Smith's claim by proving that the reasons for Bagley's proposal were legitimate and nonretaliatory, and that Smith had failed to produce any evidence that these reasons were pretextual. Without expressing any view on the correctness of the court's finding that Smith did not make out a prima facie case, we agree with its ultimate conclusion.

Bagley's proposal outlined numerous specific instances of poor performance or misconduct on the part of Smith. Smith did not contest any of Bagley's proffered reasons, or present any argument why he should nonetheless not be terminated. Our review of the record

supports the court's conclusiong that these reasons were legitimate, substantial, and nondiscriminatory; in the abscence of any evidence showing that these reasons were nonetheless pretextual, we agree with the court's conclusions.

On appeal, Smith contends that the manner in which Bagley proposed to terminate Smith violated provisions of the Civil Service Reform Act of 1978, 5 U.S.C. §4302 et seq. Smith also advanced this argument in the district court in the form of a motion for a new trial, but the district court denied the motion because (1) the theory was neither in the complaint nor advanced at trial, and (2) would not affect the outcome of the case.

We agree with the court's denial of the motion. Even assuming that this theory had the potential to affect the outcome of the case -- an assumption that appears unwarranted in light of Smith's failure to prove that, but for his participation in protected activities, Bagley's proposal to terminate him (not to mention the manner in which Bagley proposed that the termination take place) would not have come about -- Smith did not raise it until after trial and judgment. Having already been given the opportunity to try his case on all of the theories and claims which he wished to present, Smith does not have the right to retry his case on alternative theories. See Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1219 (5th Cir. 1986)(party cannot,

under the guise of a rule 52(b) motion to have the court amend its findings of fact, relitigate old issues or advance new legal theories not raised at trial).

III.

Finally, Smith alleges that the district court erred by finding that he was not handicapped within the meaning of the 1973 Rehabilitation Act, 29 U.S.C. §706(8)(B), and thus entitled to relief on his claims of handicap discrimination under 29 U.S.C. §794. But Smith offered no proof at trial of the severity of his back injury, or the effect of his injury on his life activities; he has thus failed to prove that his impairment "substantially limits one or more of [his] major life activities." 29 U.S.C. §706(8)(B).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 88-2909

CHARLES C. SMITH, SR.,

Plaintiff-Appellant,

versus

OTIS R. BOWEN, M.D.
Secretary of Health
and Human Services,

Defendant-Appellee.

Appeal from the United States

District Court for the

Eastern District of Texas

ON PETITION FOR REHEARING

(FEBRUARY 23, 1989)

Before POLITZ, KING and SMITH,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and

numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

CHARLES C. SMITH,	X	
Plaintiff	X	
V.	X	CIVIL ACTION NO.
OTIS R. BOWEN, Secretary of Health and Human Services,	X X X	TY-86-50-CA
Defendant.	X	

O R D E R

After a trial tc the court of the above-entitled and numbered employment discrimination action, judgment was entered in the defendant's favor on all claims. Now under consideration is the plaintiff's motion for a new trial and for amendment of judgment. The motion shall be treated as one made pursuant to Fed.R.Civ.P. 59 and 60.

Under Fed.R.Civ.P. 60, the disposition of a motion for relief from judgment is committed to the sound discretion of the trial court. See Seven Elves, Inc. v. Eskenazi, 635 F. 2d 396, 402 (5th Cir. 1981); Hand v. United States, 441 F.2d 529 (5th Cir. 1971); 11 C. Wright & A. Miller, Federal Practice and Procedure, §2857 (1973). Similarly, a new trial shall be granted under Fed.R.Civ.P. 59 "whenever, in [the court's] judgment, this action is required in order to prevent injustice." 11 C.Wright & A. Miller, Federal Practice and Procedure, §2805 (1973); see also North Texas Producers Association v. Metzger Diaries, Inc., 348 F.2d 189 (5th Cir. 1965), cert. denied, 382 U.S. 977 (1966). As a general rule,

a new trial should not be granted unless it is "reasonably clear ... that substantial justice has not been done," and the burden of so showing falls on the moving party. 11 C. Wright & A. Miller, Federal Practice and Procedure, §2805 (1973).

Thus, it is inappropriate to order a new trial simply to relitigate old matters, or to enable a litigant to present his case under a theory different from the ones he adopted at the former trial. 6A Moore's Federal Practice, paragraph 59.07(1987); see also Grumman Aircraft Engineering Corporation v. Renegotiation Board, 482 F.2d 710, 721-22 (D.C. Cir.), rev'd on other grounds, 421 U.S. 168 (1975). Indeed, new trials to the court are called for only when the

court has committed some manifest error of law or of fact. See Swann v. Austell, 257 F. 870 (N.D. Ga.), aff'd 261 F. 465 (5th Cir. 1919), cert. denied, 252 U.S. 579 (1920), cited in 6A Moore's Federal Practice, supra.

After a careful review of the parties' arguments and authorities, no grounds are found to warrant the modification, much less the repudiation, of the findings and judgment entered in this action. Thus, the motion for a new trial and for modification of judgment will be denied.

The plaintiff's argument, that certain adverse actions allegedly were taken against the plaintiff in violation of the 1978 Civil Service Reform Act, 5 U.S.C. §4302 et seq., were not advanced or even adumbrated at trial. The argument appears

to be makeweight, and, even if adopted, ver probably would not alter the outcome of this controversy. In any even, it would be inappropriate to saddle the defendant with the burden of defending against new theories of liability advanced pari passu after trial and judgment.

The remainder of the plaintiff's contentions on the instant motion are tantamount to criticism of the court's assignment of weight to various pieces of evidence. They do not demonstrate manifest error.

Accordingly, it is

ORDERED that the plaintiff's motion for a new trial and to amend judgment and findings shall be, and it is hereby,

DENIED.

SIGNED this 24th day of August, 1988.

/s/ Wm. Wayne Justice
CHIEF JUDGE